

HIGH COURT OF SIKKIM : GANGTOK
(Civil Extraordinary Jurisdiction)

S.B.: HON'BLE THE CHIEF JUSTICE

DATED : 12.06.2018

WP(C) No. 08 of 2018

Sushmita Dong,
W/o William Tamang,
D/o Raju Dong,
Permanent Resident of Upper Sichey,
P.O. Gangtok, East Sikkim.

... Petitioner (s).

Versus

1. State of Sikkim,
Through Chief Secretary,
Government of Sikkim.
2. The Secretary,
Labour Department,
Government of Sikkim,
Shram Bhawan, Sokaythang,
East Sikkim.
3. One Man Committee,
Justice Kalyanjyoti Sengupta,
Hon'ble Chairman,
Sikkim Lokyukta.
4. Mrs. Lakchung Sherpa,
W/o Shri R.B. Subba,
Commissioner for Employees
Compensation under the Employees
Compensation Act, 1923.

... Respondent (s).

Appearance:

Mr. Tashi Rapden Barfungpa, Advocate for the petitioner.

Mr. A. Mariarputham, Advocate General, Mr. J.B. Pradhan, Addl. Advocate General with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Asstt. Govt. Advocates for Respondents No. 1 and 2.

Mr. A. Moulik, Sr. Advocate with Ms. Tshering Uden Sherpa and Ms. Archana Sharma, Advocates for respondent No. 4.

J U D G M E N T

Satish K. Agnihotri, CJ

The Petitioner, stated to be the applicant for consideration and selection for appointment on the post of Commissioner for employees compensation under the Employees Compensation Act, 1923 (hereinafter referred to as "the Act of 1923"), on being unsuccessful, has come up with the instant petition questioning the legality and validity of the select list, wherein the 4th respondent was found successful in the merit list and placed at Sl. No. 1 and subsequently appointment on the post.

2. The facts, in brief, as projected in the pleadings, are that the Labour Department, Government of Sikkim invited applications from the eligible local candidates to fill up the post of

one Labour Commissioner under sub-Section (1) of Section 20 of the Act of 1923 by publication of notice in the news papers, Sikkim Express dated 14th December 2017 and also in other news papers, namely Sikkim Herald dated 12th December 2017, Samay Dainik dated 14th December 2017 and also published again on 15th December 2017. It was stated in the notification that applications are invited for appointment of the Labour Commissioner to deal with the compensation cases of the labourers, prescribing the qualification as under: -

“(i) The candidates should have been a member of State Judicial Service for the period of not less than 5 (five) years or is or has been for not less than 5 (five) years an Advocate or a Pleader or is or has been a Gazetted Officer for not less than 5 (five) years having educational qualification and experience in Personal Management, Human Resource Development and Industrial Relations.”

3. It was further stated that the preference shall be given to the candidates having knowledge of local language, culture and local law. The last date of submission of the application along with CV was on or before 29th December 2017. In response thereto, as many as 11 applicants, including the petitioner and the 4th respondent, submitted the applications. The Labour Department appointed One Man Selection Committee of Mr. Justice Kalyanjyoti Sengupta, Chairman, Sikkim Lokayukta, former Chief Justice of a High Court. The applicants were informed the date of interview for the post, to be held on

05th February 2018 at Tourist Lodge, Rangpo. Consequent to the selection, a Select List dated 05th February 2018 of three candidates on merit was published, wherein the 4th respondent ranked first, the petitioner ranked second and one Mr. Dinesh Chawhan was at Sl. No. 3.

4. The petitioner, finding her unsuccessful, sent a legal notice dated 19th February 2018 to the respondents, stating that the notification dated 03rd July 2017 issued by the Government prescribed the upper age limit of 40 years for employment in the State services/posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim. The 4th respondent, who was placed at Sl. No. 1 in the merit list, had already crossed the age limit of 40 years and as such her appointment was illegal. Accordingly, her candidature and appointment be declared as illegal, null and void and the petitioner be declared as selected.

5. The Labour Department replied to the legal notice, stating that the notification dated 3rd July 2017 has no relevance. The post of Labour Commissioner is created by the Parliament under the Act of 1923. The notification dated 3rd July 2017 is applicable only to the posts created by the State Government. The 4th respondent has also responded to the notice, as it was addressed to her also.

6. Consequent upon the selection, the 4th respondent was appointed as Labour Commissioner by notification dated 14th February 2018, followed by an Office Order issued on the same date, wherein the scale of Rs.51500-1230-58930-1380-63070 was granted. It was also stated that the incumbent would be entitled to draw all perquisite and benefits at par with officers of the State Government in the said pay scale. Further, it was stated that her previous service shall be counted for pensionary benefits. Being aggrieved, the instant petition is filed.

7. It is averred in the petition that the appointment of the 4th respondent is in contravention of the notification No. M(3)/(55)/GEN/DOP/PT.II dated 03rd July 2017 wherein the upper age limit is prescribed as 40 years and as such it was a clear case of nepotism and favouritism by the State Government. It is further stated that the 4th respondent had resigned from the post of Legal Remembrancer-cum-Secretary, Law Department, subsequently also from the post of Secretary in the Legal, Legislative and Parliamentary Affairs Department within a short span of time. As such, her appointment as Labour Commissioner is a case of colourable exercise of power, overlooking the statutory provisions, as stated hereinabove. It is further stated that the appointment of the 4th respondent is on account of undue favours shown by other respondents. The notification was

not widely published, disabling many aspiring candidates from making applications for the post. The constitution of One Man Committee is without any authority of law. Confining applications to the local candidates clearly establishes that the provisions of Sikkim Government Establishment Rules, 1974 are made applicable to the process of appointment. The entire selection process was just an eye-wash. The petitioner has sought a declaration to the effect that the appointment of the 4th respondent be declared as null and void and in her place, the petitioner be appointed.

8. Mr. Tashi Rapten Barfungpa, learned counsel appearing for the petitioner, in addition to the aforesaid pleadings, submits that the selection is bad on the ground that the advertisement does not prescribe pay scale. It is further alleged that since the interview was conducted in Rangpo and not in Gangtok, it vitiates the selection process. Mr. Barfungpa further submits that the 4th respondent was chosen unduly in colourable exercise of power, nepotism and favouritism. The 4th respondent has crossed the age limit of 40 years which was prescribed in the Government notification dated 03rd July 2017 and as such her appointment is null and void. Further, it was contended that the 4th respondent had resigned from various

posts, thus, appointing her again shows mala fide intention of the authorities.

9. In response, Mr. A. Mariarputham, learned Advocate General appearing for the 1st and 2nd respondents, referring and relying on the counter affidavit dated 9th May 2018, denies the allegation that the advertisement was published only in one newspaper. It is stated that the advertisement was widely published firstly on 12th December 2017 in Sikkim Herald, on 14th December 2018 in Sikkim Express and Samay Dainik, a Nepali newspaper. Again it was published on 15th December 2017 in Sikkim Herald, Sikkim Express and Samay Dainik, which was manifest by the clippings of the newspapers, annexed to the counter affidavit. Further, it is contended that the purpose of wide publicity is to inform all the eligible candidates to enable them to make applications. In the case on hand, no other persons have come forward to complain that he or she didn't have the information of the employment notice. The petitioner had due knowledge and, accordingly, she made the application and was considered for selection, thus, the petitioner cannot raise the issue that there was lack of due publicity. It is urged by the learned Advocate General that the appointment of Labour Commissioner is made under the provision of Section 20 the Act of 1923, which is a parliamentary legislation. Under the

statutory provision, the post of Commissioner, being in the nature of Tribunal, in terms of the Sikkim Public Service Commission (Exemption from Consultation) Regulation, 1986, wherein the State Government could have appointed a person, whom it consider suitable, without advertisement and selection by a Selection Committee. However, in the case on hand, proper Committee was constituted, applications were invited from the eligible candidates, as prescribed in the statute, and on due selection the appointment was made. The notification dated 03rd July 2017 has no application, as the same is applicable only for the posts created by the State Government and to the posts in Public Sector Undertakings of the State. The post of Labour Commissioner is a creation of the Parliament and as such, the same provision is not applicable. It is further contended that looking the requisite qualification and nature of job, 40 years cap could not have been prescribed. The notice inviting application for the post of Labour Commissioner was confined to serve the local needs and the interests of labourers, who are locally employed, the responsibility of the Commissioner for Employees Compensation is limited to local area, particularly, the labourers who know local language only. Even otherwise, the petitioner is a local candidate and no non-local applicant has come forward to question the veracity of employment notice. It is also submitted that if the selection process itself is illegal or improper, as

pleaded by the petitioner, claim of the petitioner for appointment cannot be pleaded and considered. The allegation of the petitioner that the selection of the 4th respondent is arbitrary and in colourable exercise of power is without any basis as the petitioner has neither pleaded nor established any fact which comes within the purview of the colourable exercise of power. Resignation of the 4th respondent from the posts of Legal Remembrancer-cum-Secretary, Law or Secretary, Legal, Legislative and Parliamentary Affairs Department, does not debar or disqualify the 4th respondent from being considered for selection as there was no stigma during her service career as she has been awarded "outstanding" grade. The petition is without any basis.

10. Referring to the observations made by the Supreme Court in Madras Institute of Development Studies and another vs. Sivasubramanian and others¹ and Ashok Kumar and another vs. State of Bihar and others², it is next contended that the petitioner after having participated in the selection process and having been unsuccessful, is debarred from questioning the selection process, particularly, when she was found placed at Sl. No. 2 in the select list. The petitioner has not questioned the correctness of the select list.

¹ (2016) 1 SCC 454

² (2017) 4 SCC 357

11. Adopting the submissions put forth by the learned Advocate General, Mr. A. Moulik, learned Senior Council appearing for the 4th respondent, would contend that the 4th respondent was fully eligible for the post and there is no challenge to her merit, the 4th respondent is not disabled on account of the fact that she had resigned from Government service, that the alleged notification, wherein the maximum age limit is prescribed to 40 years, is not applicable to the post in question, as it is a post created by Parliament and also there is no age limit prescribed in the statute itself.

12. On anxious and careful consideration of the pleadings and submissions put forth by the learned counsel appearing for the parties, it is evident that the petitioner had applied, in response to the employment notice, participated in the selection process and also she was placed at Sl. No. 2 in the select list, on being unsuccessful, she has come up with this petition, now questioning the selection process.

13. In *Dhananjay Malik and others vs. State of Uttaranchal and others*³, cited by learned Advocate General, the Supreme Court considered the selection and appointment of Physical Education Teachers at the instance of unsuccessful candidates and held as under:

³ (2008) 4 SCC 171

“8. In *Madan Lal v. State of J&K* [(1995) 3 SCC 486 : 1995 SCC (L&S) 712 : (1995) 29 ATC 603] this Court pointed out that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.

9. In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.”

14. Again in *Madras Institute of Development Studies and another vs. Sivasubramaniyan and others*¹, referring to the observation made earlier by the Supreme Court in several cases, reiterated that by having taken part in selection process with full knowledge that the candidates have the right to question the advertisement or methodology adopted by the selection board, on being unsuccessful, cannot turn around and question the selection process. It is not proper to entertain the grievance made by the unsuccessful candidates.

15. In *Ashok Kumar and another vs. State of Bihar and others*², the Supreme Court re-examined the issue and held as under:

13. The law on the subject has been crystallised in several decisions of this Court. In *Chandra Prakash Tiwari v. Shakuntala Shukla* [*Chandra Prakash Tiwari v. Shakuntala Shukla*, (2002) 6 SCC 127 : 2002 SCC (L&S) 830] , this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In *Union of India v. S. Vinodh Kumar* [*Union of India v. S. Vinodh Kumar*, (2007) 8 SCC 100 : (2007) 2 SCC (L&S) 792] , this Court held that: (SCC p. 107, para 18)

“18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. (See *Munindra Kumar v. Rajiv Govil* [*Munindra Kumar v. Rajiv Govil*, (1991) 3 SCC 368 : 1991 SCC (L&S) 1052] and *Rashmi Mishra v. M.P. Public Service Commission* [*Rashmi Mishra v. M.P. Public Service Commission*, (2006) 12 SCC 724 : (2007) 2 SCC (L&S) 345] .)”

14. The same view was reiterated in *Amlan Jyoti Borooh* [*Amlan Jyoti Borooh v. State of Assam*, (2009) 3 SCC 227 : (2009) 1 SCC (L&S) 627] wherein it was held to be well settled that the candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

16. In the case on hand, the petitioner was a local candidate, participated and also was selected and ranked 2nd in the select list and as such she is not permitted to challenge the purported non-publicity of advertisement and also the selection process, being irregular and illegal.

17. The colourable exercise of power, as pleaded by the petitioner, is considered by the Supreme Court in several cases, and defined as under.

18. In State of Punjab and another vs. Gurdial Singh and others⁴, the Supreme Court elucidated colourable exercise of power, as under:

"9.Pithily put, bad faith which invalidates the exercise of power — sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions — is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat . . . that all power is a trust — that we are accountable for its exercise — that, from the people, and for the people, all springs, and all must exist"".

19. In Kerala State Cashew Development Corporation vs. Shahal Hassan Mussaliar and another⁵, it was observed by the Supreme Court that an exercise of power which the State did not possess under the Act is colourable exercise of power.

20. In State of Kerala and another vs. Peoples Union for Civil Liberties, Kerala State Unit and others⁶, it is observed that –

"37. The doctrine of "colourable legislation" is directly connected with the legislative competence of the State."

⁴ (1980) 2 SCC 471

⁵ (2009) 12 SCC 635

⁶ (2009) 8 SCC 46

21. In *Pratibha Nema and others vs. State of M.P. and others*⁷, dealing with a case under Land Acquisition Act, wherein the proposed acquisition of land was primarily and predominantly meant to cater to the interests of the private companies, a twist was given to the acquisition as if it were for a public purpose, bypassing the requirements of Part VII of the Act, the Supreme Court held that the entire exercise was an instance of colourable exercise of power and was, therefore, *ultra vires* the powers of the State Government

22. In the instant case, it is submitted that the 4th respondent had resigned from the post of Legal Remembrancer-cum-Secretary, Law Department, thereafter from the post of Secretary, Legal, Legislative and Parliamentary Affairs Department. Again her case was considered and appointed to the post of Labour Commissioner. It is further contended that the 4th respondent's husband is high ranking functionary of the State Government, thus, undue favour was shown to her.

23. On studied examination, it is noticed that the so called high ranking functionary of the State Government, who happens to be the husband of the 4th respondent, has no say in the entire exercise. On mere assertion without producing any material, there is no reason to accept that the High Power One Man

⁷ (2003) 10 SCC 626

Selection Committee of former Chief Justice was under influence of any high ranking functionary. Resignation from two or three posts earlier cannot be held as a disqualification, debarring her or him from consideration for selection to a post unless there is some disqualification or stigma attached thereto. In the case on hand, there is nothing to establish that there was any stigma or disqualification. This Court has an occasion, in the course of argument, to examine the chart prepared by the selection committee, wherein all the candidates were awarded marks under different criteria. The maximum mark meant for the interview was only 10. It was further found that even if the petitioner were awarded full marks i.e. 10, in totality, her position would not have improved or the petitioner would not have acquired more marks than the 4th respondent. In overall consideration, placing the 4th respondent at Sl. No. 1 was just and proper.

24. Holding the interview at some place other than Gangtok, when the place of interview was not specified in the employment notice, cannot be held as irregular, as Rangpo is within the territory of Sikkim. The advertisement also cannot be held as vitiated on the stated ground that the pay scale was not stated when the petitioner was aware of it. However, the pay scale granted to the successful candidate was at par with the

District Judge, who becomes eligible on completion of five years to make application and participate in the selection for the post.

25. In such backdrop, it cannot be held that there was a colourable exercise of power or some favour was shown to the 4th respondent. The facts are not in dispute, as stated hereinabove.

26. Section 20 of the Act of 1923 reads as under:

"20. Appointment of Commissioners.- (1) The State Government may, by notification in the Official Gazette, appoint any person who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been for not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations to be a Commissioner for Employees's Compensation for such area as may be specified in the notification.

(2) Where more than one Commissioner has been appointed for any area, the State Government may, by general or special order, regulate the distribution of business between them.

(3) Any Commissioner may, for the purpose of deciding any matter referred to him for decision under this Act, choose one or more persons possessing special knowledge of any matter relevant to the matter under inquiry to assist him in holding the inquiry.

(4) Every Commissioner shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860)."

27. On bare perusal of the provision, it is manifest that the Parliament has created the post of Labour Commissioner, on prescribing the specific qualification. The State Government was empowered to appoint the Labour Commissioner keeping in view the prescribed qualification stated therein. The prescribed qualification under the provision of Section 20 of the Act of 1923

is, who is or has been a member of a State Judicial Service for a period of not less than five years or is or has been not less than five years an advocate or a pleader or is or has been a Gazetted officer for not less than five years having educational qualifications and experience in personnel management, human resource development and industrial relations. All the candidates had the requisite qualifications.

28. The prime contention of the petitioner is that the notification dated 3rd July 2017 of the Department of Personnel, Administrative Reforms, Training and Public Grievances, prescribing the upper age limit of 40 years for State employees, was not applied in the instant case. The notification reads as under:

“ NOTIFICATION

The State Government is hereby pleased to prescribe a uniform upper age limit of 40 (forty) years for all communities of the State in the services/posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim with immediate effect.

However, the posts and services for recruitment in Sikkim Police, Indian Reserve Battalion, Sikkim Armed Forces, Forest Services, Fire Services and any other posts and services which have specifically prescribed upper age limit lower than 30 (thirty) years in their recruitment rules are kept outside the purview of this notification.

This is in supersession of Notification No. M(135)/12/GEN/DOP dated 27/05/2015.

By order and in the name of the Governor.

Sd/-
(Surekha Pradhan) Mrs.
Additional Secretary to the Government
Department of Personnel, Administrative Reforms,
Training and Public Grievances”

The notification is crystal clear that the uniform upper age limit of 40 years prescribed therein is applicable for all communities of the State services/posts to be filled up by direct recruitment under the Government of Sikkim and in the State Public Sector Undertakings of Sikkim and some services were excluded from the notification.

29. Indisputably, the post of Commissioner for employees compensation, which is termed as Labour Commissioner, is a creation of Parliament enactment, not under the State Government but under the Central Government. This contention of the respondents that this notification is inapplicable deserves acceptance and I do not find any reason to the contrary. No other documents have been produced, in support of the contention that the upper age limit of 40 years is prescribed for Labour Commissioner also. Moreover, looking into the requirement of requisite qualification, 40 years cannot be fixed as upper age limit, thus the upper age limit appears to be for those services wherein appointment is made directly by the young freshers. Section 20 of the Act of 1923 contemplates experienced person having put in some qualifying services as judicial officer or as a gazette officer or in legal profession. This

requirement is for a senior seasoned man, wherein the upper age limit of 40 years cannot be prescribed.

30. It is also contended by the petitioner that before selection, no rules were framed under the Act of 1923. Section 32 of the Act of 1923 empowers the State to make rules to carry out the purpose of the Act. Under that Section, there is no delegation with regard to appointment of Labour Commissioner. Thus, the State Government is not competent to frame rules for selection and appointment of the Labour Commissioner. Even otherwise non framing of rules does not invalidate the selection for any post.

31. As a sequitur, the writ petition is devoid of merit and is, accordingly, dismissed.

32. Costs made easy.

Chief Justice
12.06.2018

jk Approved for Reporting : Yes/~~No~~.
Internet : Yes/~~No~~.